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E-filed June 1, 2010

5
6 **UNITED STATES BANKRUPTCY COURT**
7 **DISTRICT OF NEVADA**

8
9 IN RE:) Case No. BK-S-09-24688-lbr
YAKUBIK, JOSEPH WILLIAM, and) Chapter 11
10 YAKUBIK, DARCIE ANN)
11) Date: June 16, 2010
Time: 1:30 p.m.

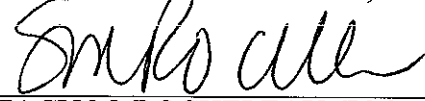
12 **OPPOSITION TO MOTION FOR RELIEF FROM AUTOMATIC STAY AND**
13 **COUNTERMOTION TO SELL REAL PROPERTY**

14 Joseph William Yakubik and Darcie Ann Yakubik, the above-captioned debtors (the
15 "Debtors"), by and through their counsel, hereby submit their Opposition (this "Opposition") to the
16 Motion for relief from Automatic Stay (the "Motion") filed by Wells Fargo Bank, N.A., and
17 countermove this Court for an order approving the Sale of Real Property Free and Clear of Liens,
18 Charges, Interest and Encumbrances Pursuant to 11 U.S.C. §363(b)(1).

19 This countermotion is made pursuant to 11 U.S.C. §§ 105 and 363, and Rules 2002(a)(2) and
20 6004(a) and (c) of the Federal Rules of Bankruptcy Procedure. This Motion is further based upon
21 the following Memorandum of Points and Authorities, the pleadings, papers, exhibits, the entire case
22 file, and any oral arguments this Court may wish to hear.

23 DATED this 1st day of June, 2010.

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MEMORANDUM OF POINTS AND AUTHORITIES

I. JURISDICTION AND VENUE

1. This Court has jurisdiction over this matter pursuant to 28 U.S.C. §§ 157(B)(1) and 1334. This is a core proceeding pursuant to 28 U.S.C. §157(B)(2)(a).

2. Venue is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

3. The statutory predicates for the relief sought herein are §§ 105(a) and 363 of the Bankruptcy Code, and Rules 2002(a)(2) and 6004(a) and (c) of the Federal Rules of Bankruptcy Procedure.

II. FACTUAL BACKGROUND

4. On August 12, 2009 (the "Petition Date"), Joseph Yakubik and Darcie Yakubik (the "Debtors") filed a voluntary petition for relief under chapter 11.

5. On February 17, 2010, Debtors filed a Disclosure Statement [Docket No. 130] and proposed chapter 11 plan [Docket No. 129] (the "Plan").

6. On March 20, 2010, Debtor received an offer to purchase property commonly known as 4443 E. Harmon Avenue, Las Vegas Nevada 89121 (the "Property") for \$54,000. A true and correct copy of the proposed Real Estate Purchase Contract (the "Contract" dated March 20, 2010 is attached as Exhibit "1").

7. The Buyer made an Earnest Money Deposit in the amount of a \$1,000 check to Nevada Title Company in connection with the Buyer's offer to purchase the Property.

8. On April 19, 2010, Debtors filed an Amended Disclosure Statement [Docket No. 167] (the "Amended Disclosure Statement"), and the Debtors, in anticipation of the sale of the property, did not include the property in the Chapter 11 plan.

9. On April 7, 2010, Wells Fargo Bank, N.A. ("Wells Fargo") filed its Motion for relief from the automatic stay on the Property.

10. The Motion seeks relief from the automatic stay pursuant to 11 U.S.C. § 362(d)(2) based on a stated lack of equity in the property.

11. On May 15, 2010, Debtors filed a Seconded Amended Disclosure Statement (the "Second Amended Disclosure Statement") and Amended Chapter 11 plan (the "Amended Plan").

1 12. The Debtor listed the value of the Property and building at \$60,000. [Docket No. 18,
2 Schedule A].

3 13. Pursuant to the preliminary title report obtained, the Property is encumbered by two
4 (2) liens currently recorded against the Property:

5 (a) Deed of Trust recorded June 3, 1994 by Wells Fargo Bank against the property in the
6 amount of \$86,912.00; and

7 (b) Deed of Trust recorded August 26, 1996 by Firstplus Financial, Inc. against the
8 Property in the amount of \$25,000.00.

9 14. An appraisal was obtained on the Property by a Nevada Licensed Appraisal on or
10 about April 7, 2010, stating the value of the Property is \$54,000.00. See Exhibit "2."

11 15. The contract price is equal to the value of the Property.

12 16. By way of this countermotion, the Debtors seek authorization to sell the Property to
13 the proposed Buyer pursuant to the Contract for \$54,000.00, free and clear of all interests, charges,
14 liens or encumbrances.

15 17. All net proceeds of the sale of the property will be used to pay first lien holder Wells
16 Fargo Bank, N.A.

17 18. Monthly payments have not been made to Wells Fargo Bank, N.A. due to the property
18 remaining vacant for the past six months, which is was mainly due to the poor condition of the
19 property. As depicted on the initial photograph on the appraisal, and as stated in the appraisal, the
20 subject property has higher typical physical depreciation for the actual age. The subject property is
21 missing flooring, has some partial drywall repairs, but is not finished and/or painted, has damaged
22 exterior siding, and a damaged roof which is likely leaking.

23 19. Should the court decline to approve the sale, the Debtors propose that monthly
24 adequate protection payments be made pending the amendment and approval of the disclosure
25 statement.

26 20. If proposed sell is not approved, the Buyer has agreed to a lease option on the
27 property which also allows for immediate rent payments to be released to Wells Fargo Bank, N.A.
28

III. LEGAL AUTHORITIES

Section 363(b)(1) of the Bankruptcy Code provides for the sale of the Debtor's property as follows:

(1) The trustee, after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate, except that if the debtor in connection with offering a product or a service discloses to an individual a policy prohibiting the transfer of personally identifiable information about individuals to persons that are not affiliated with the debtor and if such policy is in effect on the date of the commencement of the case, then the trustee may not sell or lease personally identifiable information to any person unless—

(A) such sale or such lease is consistent with such policy; or
(B) after appointment of a consumer privacy ombudsman in accordance with section 332, and after notice and a hearing, the court approves such sale or such lease—

(i) giving due consideration to the facts, circumstances, and conditions of such sale or such lease; and

(ii) finding that no showing was made that such sale or such lease would violate applicable nonbankruptcy law.

Thus, pursuant to Section 363(b)(1) of the Bankruptcy Code, the Trustee, after notice and hearing, may sell property of the Debtor, other than in the ordinary course of business. The trustee's application of his sound business judgment in the use, sale or lease of property is subject to great judicial deference. See, e.g., *In re Moore*, 110 B.R. 924 (Bankr. C.D.Cal. 1990); *In re Canyon P'ship*, 55 B.R. 520 (Bankr. S.D.Cal. 1985). In determining whether any sale of assets outside the ordinary course of business should be approved, bankruptcy courts generally consider the following factors:

1. Whether a sufficient business reason exists for the sale;
2. Whether the proposed sale is in the best interest of the estate, such that the proposed sale terms should have been properly negotiated and proposed in good faith and the purchaser should have been involved in an "arms-length" transaction with the seller; and
3. Whether notice of the sale was sufficient.

See *In re Walter*, 83 B.R. 14, 19-20 (B.A.P. 9th Cir. 1988) (stating that there must be some articulated business justification for using, selling or leasing the property outside the ordinary course of business) (citing *In re Lionel Corp.*, 722 F.2d 1063 (2d Cir. 1983) (stating that the bankruptcy court should consider all salient factors pertaining to the proceeding and, accordingly, act to further the diverse interest of the debtor, creditors and equity holders alike)).

The bankruptcy court's evaluation of a proposed sale of assets free and clear of liens requires

1 a finding that the sale must be in the best interest of the estate. See *In re Hunt Energy, Co.*, 48 B.R.
 2 472, 485 (Bankr. N.D.Ohio 1985) (citing *Seychelles, P'ship & Genius Corp. v. Banyan Corp.*, 32
 3 B.R. 708, 711 (Bankr. N.D.Tex. 1983); *In re Bridges*, 19 B.R. 847, 849 (Bankr. D.Me. 1982) (stating
 4 that the sale of personalty subject to the lien of an over-secured, cross-collateralized creditor
 5 benefitted the estate by satisfying part of the creditor's claim, thereby releasing other cross-
 6 collateralized estate property from that portion of the creditor's secured claim).

7 While a number of terms have been adopted to describe the requirement under Section 363,
 8 numerous courts have predicated their approval of a sale under Section 363(f) upon a finding that the
 9 proposed price is fair. See *In re Healthco Int'l, Inc.*, 174 B.R. 174, 177 (Bankr. D.Mass. 1994); see
 10 also *In re 18th Ave. Dev. Corp.*, 14 B.R. 862, 863 (Bankr. S.D.Fla. 1981) (court approved sale of
 11 individual single family homes subject to lien on entire development was approved under Section
 12 363(f), finding it was necessary for trustee to ensure "highest possible price was paid").

13 Section 363(f) provides that the Trustee may sell the Debtor's property free and clear under
 14 the provisions of subsection (b) only if one of the following conditions is met:

- 15 (1) applicable nonbankruptcy law permits sale of such property free and clear of
such interest;
- 16 (2) such entity consents;
- 17 (3) such interest is a lien and the price at which such property is to be sold is
greater than the aggregate value of all liens on such property;
- 18 (4) such interest is in bona fide dispute; or
- 19 (5) such entity could be compelled, in a legal or equitable proceeding, to accept a
money satisfaction of such interest.

20 In the instant case, the sales price of the Property is fair as it equals current market value, and
 21 given the current condition of the Property, this would appear to be the highest possible price the
 22 creditor could hope to sell the Property for if it were permitted to lift the stay and sell the Property at
 23 at a foreclosure sale. The sale of this Property pursuant to the attached contract is in the best interest
 24 of the estate as it will eliminate a property tax liability and will eliminate the Debtor's annual costs to
 25 maintain the Property, which is currently vacant, and the estate currently bears a potential liability
 26 and continued maintenance costs. The sale will also eliminate the burden of the Debtors to repair the
 27 home to current market standards for rental. The previous tenant left the home in dis-repair with
 28 approximately \$25,000 in repairs that the estate cannot afford to advance funds to repair the home at

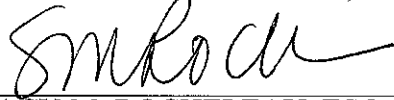
1 this time.

2 **IV. CONCLUSION**

3 The Debtors respectfully requests that this Court enter an order granting the relief requested
4 and authorizing the sale of the Property with the benefit of 11 U.S.C. § 363(b)(1), free and clear of
5 all liens, and the proceeds of the sale of the Property be authorized to be released to Wells Fargo
6 Bank and for such other and further relief as is just and proper.

7 DATED this 1st day of June, 2010.

ROCHELEAU LAW GROUP, P.C.

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Attorneys for Debtors

13 **CERTIFICATE OF SERVICE OF OPPOSITION TO MOTION FOR RELIEF FROM**
14 **AUTOMATIC STAY AND COUNTERMOTION TO SELL REAL PROPERTY 7**

15 On June 1, 2010 I served the above-named document by the following means to the persons
16 listed below:

17 ☒ a. **ECF System:**

18 ADAM P BOWLER and TIMOTHY S. CORY

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19 DAVID A. COLVIN on behalf of Creditor TUCKER INVESTMENTS, LLP

20 dcolvin@marquisaurbach.com; walters@marquisaurbach.com; kgallegos@marquisaurbach.com;
tszostek@marquisaurbach.com

21 REW R. GOODENOW on behalf of Creditor Celtic Bank at ecf@parsonsbehle.com

22 KEVIN HAHN on behalf of Creditor CENTRAL MORTGAGE COMPANY at kevin@mclaw.org

23 BRIAN E HOLTHUS on behalf of Creditor GMAC Inc. at bankruptcy@juwww.com

24 ROBERT R. KINAS on behalf of Counter-Defendant TEXTRON FINANCIAL CORPORATION

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28 U.S. TRUSTEE - LV - 11 at USTPRegion17.lv.ecf@usdoj.gov

1 ACE C VAN PATTEN on behalf of Creditor CITIMORTGAGE, INC.
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2 GREGORY L. WILDE on behalf of Creditor Wells Fargo Bank, N.A. and US BANK NATIONAL ASSOCIATION at
3 bk@wildelaw.com

4 JAMES H. WOODALL on behalf of Creditor PROVIDENT FUNDING ASSOCIATES, L.P. at jw@utahtrustee.com

5 ANNA JANE I ZARNDT on behalf of Creditor GMAC Inc. at BANKRUPTCY@JUWW.COM

6 ☒ b. **United States mail, postage fully prepaid:**

7 Creditors listed on the attached matrix

8 ☐ c. **Personal Service:**

9 ☐ For a party represented by an attorney, delivery was made by handing the
10 documents to the attorney or by leaving the documents at the attorney's
11 office with a clerk or other person in charge, or if no one is in charge by
12 leaving the documents in a conspicuous place in the office.

13 ☐ For a party, delivery was made by handing the documents to the party or by
14 leaving the documents at the person's dwelling house or usual place of abode
15 with someone of suitable age and discretion residing there.

16 ☐ d. **By direct email:**

17 Based upon the written agreement of the parties to accept service by email or a
18 court order, I caused the documents to be sent to the persons at the email
19 addresses listed below. I did not receive, within a reasonable time after the
20 transmission, any electronic message or other indication that the transmission
21 was unsuccessful.

22 ☐ e. **By fax transmission:**

23 Based upon the written agreement of the parties to accept service by fax
24 transmission or a court order, I faxed the documents to the persons at the fax
25 numbers listed below. No error was reported by the fax machine that I used. A
26 copy of the record of the fax transmission is attached.

27 ☐ f. **By messenger:**

28 I served the documents by placing them in an envelope or package addressed to
the persons at the addresses listed below and providing them to a messenger for
service. (A declaration by the messenger must be attached to this Certificate of
Service).

29 **I declare under penalty of perjury that the foregoing is true and correct.**

30 

31 Stacy M. Rocheleau

32 An employee of ROCHELEAU LAW GROUP, PC

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0978-2
Case 09-24688-lbr
District of Nevada
Las Vegas
Fri May 14 14:40:02 PDT 2010

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The following recipients may be/have been bypassed for notice due to an undeliverable (u) or duplicate (d) address.

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(d)TEXTRON FINANCIAL CORPORATION
C/O SNELL & WILMER L.L.P.
ATTN: ROBERT KINAS, ESQ.
3883 HOWARD HUGHES PARKWAY #1100
LAS VEGAS, NV 89169-0965

End of Label Matrix
Mailable recipients 99
Bypassed recipients 8
Total 107